

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. BAHAM and DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS, New Orleans, LA

*Docket No. 00-2180; Submitted on the Record;
Issued June 13, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration dated February 8, 2000 under 5 U.S.C. § 8128(a); and (2) whether the Office properly found that appellant's request for reconsideration dated March 23, 2000 was not timely filed and failed to present clear evidence of error.

The Office accepted appellant's claim for an acute lumbosacral strain and herniated nucleus pulposus at L4-5 resulting from a December 7, 1984 employment injury.

In a report dated July 16, 1997, appellant's treating physician, Dr. Robert Po, a Board-certified orthopedic surgeon, stated that appellant's current impairment was due to his December 7, 1984 employment injury and prevented him from returning to his preinjury job. In a report dated October 20, 1997, Dr. Po stated that appellant could work eight hours, should be on light-work status subject to his previously stated lifting and carrying restrictions, and should be limited in the amount of kneeling, squatting and climbing activities.

In a report dated February 28, 1998, the rehabilitation counselor identified the full-time job of general clerk as within appellant's vocational experience and physical restrictions. It was a full-time job.

By decision dated September 29, 1998, the Office reduced appellant's compensation, effective September 29, 1998, stating that the position of general clerk was suitable for appellant medically and vocationally and represented appellant's wage-earning capacity.

By letter dated October 29, 1998, appellant requested review of the written record by an Office hearing representative and submitted additional evidence of a magnetic resonance imaging (MRI) scan dated September 29, 1998 showed spinal stenosis of an acquired variety at L4-5, multi-level milder degrees of disc disease and severe facet disease. In an October 16, 1998 report, Dr. Po stated that appellant had shown persistent pain in his back with radiation down both legs, more on the right than the left, and that appellant was unable to perform work of any

kind. He reviewed the computerized axial tomography (CAT) scan dated July 17, 1995 and the September 29, 1998 MRI scan and diagnosed chronic back strain with degenerative disc disease and spinal stenosis of L4-5 with disc herniation. Dr. Po stated that the progression of deterioration of appellant's lumbar spine had progressed. He advised that appellant "be on no work status for any job at all." He stated that in an eight-hour period, appellant could "stand/walk" for four hours and "continuously for one half hour" and could sit for four hours and continuously for one hour, but should avoid kneeling, squatting or climbing. Dr. Po stated that appellant should indefinitely be restricted from driving or operating office equipment and from exposure to vibration, heights or confined places.

By decision dated February 10, 1999, the Office hearing representative affirmed the Office's September 29, 1998 decision.

By letter dated February 8, 2000, appellant requested reconsideration of the Office's decision and stated that an August 26, 1999 report from Dr. Po was enclosed.

In a nonmerit decision dated March 17, 2000, the Office denied appellant's request for reconsideration. The Office stated that Dr. Po's August 26, 1999 report was not enclosed. Therefore, appellant did not raise substantive legal questions nor include new and relevant evidence.

By letter dated March 23, 2000, appellant requested reconsideration and submitted Dr. Po's August 26, 1999 report. Dr. Po stated that to a reasonable degree of medical probability the lumbar sprain and herniated nucleus pulposis aggravated appellant's degenerative disc disease, arthritis and stenosis. He added: "[T]he fact that appellant cannot work does not mean he cannot do some activity. To be completely off work would indicate inability to use the lower or upper extremities." He reiterated the physical requirements of the general clerk position stating that it was sedentary and had a maximum lifting requirement of 10 pounds. Dr. Po stated that appellant's inability to do work was also related to nonwork conditions which included a myocardial infarction requiring a cardiac bypass in 1992, bilateral knee arthritis requiring arthroscopy of the left knee, complete right shoulder rotator cuff tear and degeneration of the spine. He concluded that appellant was unable to perform work of any kind.

By decision dated April 28, 2000, the Office denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to present clear evidence of error.

The only decisions before the Board on this appeal are the Office's March 17, 2000 decision denying appellant's request for reconsideration and the Office's April 28, 2000 decision denying appellant's request for a review on the merits. Because more than one year has elapsed between the issuance of the Office's February 10, 1999 decision and April 28, 2000, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the Office's February 10, 1999 decision.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for consideration of the merits as requested in his February 8, 2000 letter.

To require the Office to reopen a case for merit review under section 8128(a) of Federal Workers' Compensation Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).²

In this case, despite the assertion of appellant's attorney's to the contrary, no evidence was submitted with the February 8, 2000 letter requesting reconsideration. Also, appellant did not show that the Office erroneously applied or interpreted a specific point of law. Nor did he advance a relevant legal argument not previously considered by the Office. Therefore, the Office properly refused to reopen the record for merit review.

The Board also finds that appellant's request for reconsideration dated March 23, 2000 was not timely filed and failed to present clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.⁴ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁵

The Board finds that, because more one year has elapsed from the date of the Office's February 10, 1999 merit decision to the date that appellant's request for reconsideration was filed, March 23, 2000, appellant's request for reconsideration is untimely. The Board also finds that the evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's February 10, 1999 decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

Dr. Po's August 26, 1999 report concluded that although appellant could not work, he could do some activity, noting that the position of general clerk was sedentary with a maximum lifting requirement of 10 pounds. Dr. Po then referred to appellant's nonwork-related conditions including bilateral knee arthritis and a shoulder rotator cuff tear and stated that all of these

¹ Section 10.606(b)(2)(i-iii).

² Section 10.608(a).

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

factors indicated an inability to perform work of any kind. His report is contradictory and unclear, especially on the issue of whether appellant is partially or totally disabled due to the accepted conditions. His report does not contain a rationalized medical opinion explaining that appellant cannot perform the job of general clerk.⁶ Dr. Po's report therefore does not show that the Office's prior decisions were in error.

The April 28 and March 17, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
June 13, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁶ See *Betty M. Regan*, 49 ECAB 496, 502 (1998).